Supreme Court, U.S.
FILED
AUG 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-175

In The

Supreme Court of the United States

October Term, 1986

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,

Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*,

Respondents.

Petition For a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RICHARD A. KEENEY
General Counsel
Law Department
NORFOLK SOUTHERN CORPORATION
8 North Jefferson Street
Roanoke, Virginia 24042-0041
(703) 981-5615

WILLIAM B. POFF*
W. FAIN RUTHERFORD
D. STAN BARNHILL
FRANK K. FRIEDMAN
WOODS, ROGERS & HAZLEGROVE
105 Franklin Road, S.W.
Post Office Box 720
Roanoke, Virginia 24004-0720
(703) 982-4200

Counsel for Norfolk and Western Railway Company, et al.

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 228-8845 (tone) 75
or call collect (402) 342-2831

13pp

QUESTION PRESENTED

WHETHER THE NORRIS-LaGUARDIA ACT SHOULD BE CONSTRUED TO ALLOW UNLIMITED SECONDARY PICKETING IN THE RAILROAD INDUSTRY IN CONTRAVENTION OF THE PURPOSES AND PROVISIONS OF THE RAILWAY LABOR ACT AND ESTABLISHED FEDERAL LABOR POLICY.

LIST OF PARTIES AND RULE 28.1 LIST

The petitioners in this case include Norfolk and Western Railway Company and Southern Railway Company and its subsidiaries.* Norfolk and Western Railway Company and Southern Railway Company are affiliates and wholly owned subsidiaries of Norfolk Southern Corporation.

The respondents in this case are the Brotherhood of Maintenance of Way Employes and union officers O.M. Berge, President, J. W. Pugh, General Chairman, T. R. McCoy, Vice General Chairman, J. L. Hockaday, General Chairman, William McWreath, General Chairman, J. L. D'Anniballe, General Chairman, Sol Hammons, Jr., General Chairman, D. E. DeLoach, General Chairman, M. A. Christie, International Vice President, B. L. Hall, International Vice President, and W. E. LaRue, International Vice President.

---

*The subsidiaries of Southern Railway Company are: The Cincinnati, New Orleans and Texas Pacific Railway Company, The Alabama Great Southern Railroad Company, The New Orleans Terminal Company, Georgia Southern and Florida Railway Company, St. John's River Terminal Company, Central of Georgia Railroad Company, Georgia Northern Railway Company, Live Oak, Perry and South Georgia Railway Company, Tennessee Railway Company, Tennessee, Alabama & Georgia Railway Company, Atlantic and East Carolina Railway Company, Carolina and Northwestern Railway Company, Interstate Railroad Company.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. THE FOURTH CIRCUIT'S HOLDING THAT THE NORRIS-LaGUARDIA ACT PERMITS UNLIMITED SECONDARY PICKETING IN THE RAIL INDUSTRY DEPARTS DRASTICALLY FROM PRIOR FEDERAL CASE LAW, INCLUDING LEADING DECISIONS IN THE FIFTH AND EIGHTH CIRCUITS, AND REQUIRES SUPREME COURT REVIEW TO RESOLVE THE RESULTING CONFLICT IN THE CIRCUITS ON A RECURRING ISSUE OF NATIONAL IMPORTANCE	6
A. The Fourth Circuit's Holding That Rail Unions May Initiate Unlimited Secondary Picketing Against Neutral Railroads Represents a Radical Departure From Prior Case Law and Creates a Split in the Circuits	6
B. The Split in the Circuits Involving Rail Unions' Right to Initiate Unlimited Secondary Activity Against Neutral Railroads Involves an Important and Recurring Issue Which Merits this Court's Review and Resolution	12
II. THE FOURTH CIRCUIT'S REFUSAL TO ACCOMMODATE NORRIS-LaGUARDIA TO THE RAILWAY LABOR ACT IGNORES SUPREME COURT PRECEDENT, IS ANTITHETICAL TO NATIONAL LABOR POLICY, AND YIELDS ABSURD RESULTS IN THE RAIL LABOR CONTEXT	14

TABLE OF CONTENTS—Continued

Page

A. Supreme Court Precedent Mandates the Accommodation of Norris-LaGuardia to the Railway Labor Act in Furtherance of National Labor Policy 14

B. The Fourth Circuit's Failure to Accommodate Norris-LaGuardia to the Railway Labor Act Engenders Absurd Results in the Rail Labor Context 21

III. THE FOURTH CIRCUIT'S DECISION MISCONSTRUED AND MISAPPLIED SUPREME COURT PRECEDENT INVOLVING THE APPLICABILITY OF THE NORRIS-LaGUARDIA ACT 23

CONCLUSION 26

APPENDIX A—Opinion of the United States Court of Appeals for the Fourth Circuit, *Norfolk and Western Railway Company, et al. v. Brotherhood of Maintenance of Way Employees, et al.*, No. 86-3555 (July 11, 1986) ..... A. 1

APPENDIX B—Opinion of the United States Court of Appeals for the Fourth Circuit, *Richmond, Fredericksburg and Potomac Railroad Company v. Brotherhood of Maintenance of Way Employees*, No. 86-3544 (July 11, 1986) A. 5

APPENDIX C—Order of United States District Court for the Western District of Virginia, Roanoke Division, Order for Preliminary Injunction, *Norfolk and Western Railway Company, et al. v. Brotherhood of Maintenance of Way Employees, et al.*, No. 86-0191-R (April 22, 1986) ..... A. 23

APPENDIX D—Statutes Involved ..... A. 26

TABLE OF AUTHORITIES

Page

Cases

Alton & Southern Ry. v. Brotherhood of Ry. Clerks, 99 L.R.R.M. 2323 (D.D.C.), *aff'd*, 99 L.R.R.M. 3326 (D.C. Cir.), *cert. denied*, 439 U.S. 996 (1978) 9, 10

Ashley, Drew & N. Ry. v. United Transp. Union, 625 F.2d 1357 (8th Cir. 1980) 5, 7, 9, 12, 18

Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970) 19

Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R., 362 F.2d 649 (5th Cir.), *aff'd by an equally divided court*, 385 U.S. 20 (1966) 7, 8, 9, 12

Brotherhood of R.R. Trainmen v. Chicago R. & I.R.R., 353 U.S. 30 (1957) 15

Brotherhood of R.R. Trainmen v. Jacksonville Terminal, 394 U.S. 369 (1969) 18, 23, 24

Burlington Northern Railroad Co. v. BMWE, No. 86-1666 (7th Cir. June 4, 1986), *cert. filed*, No. 86-39, July 15, 1986 ..... 7, 12

Central Vermont Ry. v. BMWE, No. 86-5245 (D.C. Cir. May 14, 1986; June 27, 1986) 7, 12

Chicago and N.W. Ry. v. United Transp. Union, 402 U.S. 570 (1971) 15, 17, 18

Consolidated Rail Corp. v. Brotherhood of Ry. Clerks, 99 L.R.R.M. 2607 (W.D.N.Y. 1978) 9

Consolidated Rail Corp. v. BMWE, No. 86-7289 (2d Cir. June 5, 1986) 7, 12

Detroit & Toledo S.L.R.R. v. United Transp. Union, 396 U.S. 142 (1969) 16, 22

Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) 10

TABLE OF AUTHORITIES—Continued

Page

Erie R.R. v. Local 1286, International Longshoremen's Ass'n, 117 F. Supp. 157 (W.D.N.Y. 1953) 8

Illinois Central R.R. v. International Brotherhood of Teamsters, Local 568, 90 F. Supp. 640 (W.D. La. 1950) 8

International Bro. of Elec. Wkrs. v. N.L.R.B., 350 F.2d 791 (D.C. Cir. 1965) 20

Jacksonville Bulk Terminals v. International Longshoremen's Ass'n, 457 U.S. 702 (1982) 23, 24, 25

Lakefront Dock & Railroad Terminal Co. v. ILA, 333 F.2d 549 (6th Cir. 1962) 8, 12

Marriott In-Flite Services v. Local 504, Air Div. Transport, 557 F.2d 295 (2d Cir. 1977) 20

Pacific Gamble Robinson Co. v. Minneapolis & St. Louis Ry., 85 F. Supp. 65 (D. Minn. 1949) 8

Richmond, Fredericksburg and Potomac Railroad Company v. Brotherhood of Maintenance Employees, No. 86-3544 (4th Cir. July 11, 1986) 2, 12

Smith's Management Corp. v. IBEW, 737 F.2d 788 (9th Cir. 1984) 12

Southern Ry. v. Brotherhood of Ry. Clerks, 458 F. Supp. 1189 (D.S.C. 1978) 9

Terminal R.R. Ass'n v. Brotherhood of Ry. Clerks, 458 F. Supp. 100 (E.D. Mo. 1978) 9

Texas & N.O.R.R. v. Brotherhood of Ry. & Steamship Clerks, 281 U.S. 548 (1930) 16

Toledo A.A. & N.M. Ry. v. Pennsylvania Co., 54 Fed. 730 (N.D. Ohio 1893) 16

TABLE OF AUTHORITIES—Continued

Page

Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515 (1937) 15, 16

Western Maryland R.R. v. System Board of Adjustment, 465 F. Supp. 963 (D. Md. 1979) 9

STATUTES

28 U.S.C. § 1254(1) 2

29 U.S.C. § 104 3

29 U.S.C. § 113(a) 3, 6

29 U.S.C. § 158(b)(4) 3, 7

45 U.S.C. § 151(a) 2, 3, 7, 16

45 U.S.C. § 152 2

45 U.S.C. § 152 First 2, 15, 18

45 U.S.C. § 152 Second 2

45 U.S.C. § 152 Seventh 2

45 U.S.C. § 153 ..... 15, 16

45 U.S.C. § 155 First 2, 16

45 U.S.C. § 156 ..... 2, 3, 16

45 U.S.C. § 157 2

45 U.S.C. § 160 2

49 U.S.C. §§ 10101 *et seq.* 3, 6

49 U.S.C. § 11101(a) 3

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

93 Cong. Rec. (1947) 19, 20

105 Cong. Rec. (1959) 19

BNA, Daily Labor Report No. 137 (July 17, 1986) 13

F. Frankfurter and N. Greene, *Congressional Power Over the Labor Injunction,* 31 Colum. L. Rev. 385 (1931) 11

F. Frankfurter and N. Greene, *The Labor Injunction* 217 (1930) 11

H. R. Rep. No. 328, 69th Cong., 1st Sess. (1926) 16

S. Rep. No. 187, 86th Cong., 1st Sess. (1959) 20

Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 93rd Cong., 2d Sess., *Legislative History of the Railway Labor Act, as Amended (1926 through 1966)* (1974) 17

No.————

In The

Supreme Court of the United States

October Term, 1986

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,

Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*,

Respondents.

Petition For a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

The petitioners, Norfolk and Western Railway Company, *et al.*, (hereinafter "NS Railroads") respectfully request that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered on July 11, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (a two-to-one decision, Judge Widener dissenting) is reported at — F.2d —, No. 86-3555 (4th Cir. July 11, 1986), and is reprinted in the Appendix hereto at A. 1 - A. 4.[1] The unreported order by the United States District Court for the Western District of Virginia granting NS Railroads' request for a preliminary injunction, which was entered on April 22, 1986, is reprinted in the Appendix hereto at A. 23 - A. 25.

———o———

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on July 11, 1986.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

———o———

STATUTES INVOLVED

This case concerns the proper interpretation of certain sections of the Railway Labor Act (hereinafter "RLA"), 45 U.S.C. §§ 151a, 152 First, Second and Seventh, 155 First, 156, 157, and 160, and certain sections of the

---

[1]The Fourth Circuit stated the rationale of its decision below in a related case, *Richmond, Fredericksburg and Potomac Railroad Company v. Brotherhood of Maintenance Employees*, No. 86-3544 (4th Cir. July 11, 1986) which is reprinted in the Appendix hereto at A. 5 - A. 23. That case involved the same legal issues, despite factual differences, as the instant case.

Norris-LaGuardia Act (hereinafter "Norris-LaGuardia"), 29 U.S.C. §§ 104 and 113. Those statutory provisions and other related sections are reproduced in the Appendix, at A. 26 - A. 38. Those provisions must be interpreted in light of other statutes, including Section 8(b)(4) of the National Labor Relations Act (hereinafter "NLRA"), 29 U.S.C. § 158(b)(4), and Section 11101(a) of the Interstate Commerce Act, 49 U.S.C. § 11101(a), which are also set forth in the Appendix.

STATEMENT OF THE CASE

This petition arises out of a preliminary injunction issued by the District Court of the Western District of Virginia on April 22, 1986, restraining the Brotherhood of Maintenance of Way Employes (hereinafter "BMWE") and its members from engaging in secondary picketing at Petitioners' facilities. Jurisdiction to issue the preliminary injunction was based on the RLA, 45 U.S.C. §§ 151 *et seq.*, and the Interstate Commerce Act, 49 U.S.C. §§ 10101 *et seq.*

This case has its genesis in a labor dispute between BMWE and the Maine Central Railroad and its wholly owned subsidiary, the Portland Terminal Company (hereinafter "MEC/PTC"), both of which in turn are subsidiaries of Guilford Transportation Industries (hereinafter "Guilford"). On March 3 and 4, 1986, BMWE began a primary strike against MEC/PTC after previously exhausting the mediation procedures provided for in Section 6 of the RLA, 45 U.S.C. § 156.

In order to apply additional economic pressure on MEC/PTC to force resolution of the labor dispute, BMWE extended its picketing on March 6, 1986, to include the facilities of Delaware and Hudson Railroad and the Boston and Maine Railroad, two other subsidiaries of Guilford, but with which BMWE had no primary dispute.

On April 8, 1986, BMWE's president sent a telegram to the president of the Association of American Railroads threatening to spread the picketing to other rail carriers nationwide on the erroneous premise that the nation's railroads were parties to a mutual aid arrangement designed to provide financial and other assistance to MEC/PTC. BMWE thereafter began secondary picketing of railroads from New England to Los Angeles, with picketing beginning at petitioner NS Railroads' facilities in Bellevue, Ohio, on April 10, 1986. On April 11, 1986, petitioners obtained a temporary restraining order from the district court below which was converted, after an evidentiary hearing, to a preliminary injunction on April 22, 1986. (A. 23 - A. 25.)

Prior to the preliminary injunction hearing, BMWE discovered that none of the nation's railroads had a mutual aid agreement with Guilford or its subsidiaries. At the hearing, therefore, BMWE adopted two alternative legal theories: (1) that under the Norris-LaGuardia Act's anti-injunction provisions secondary picketing could not be enjoined in the rail industry in general, or (2) that the courts could not enjoin secondary picketing against those secondary rail carriers who had substantially aligned themselves with Guilford. The district court rejected the first theory as a matter of law based on the Eighth Cir-

cuit's decision in *Ashley, Drew & Northern Railway v. United Transportation Union,* 625 F.2d 1357 (8th Cir. 1980). The court also held that BMWE had failed to prove the requisite substantial alignment between petitioners and Guilford necessary to support the alternative theory. (A. 3 - A. 4; A. 15; A. 18 - A. 19.)

On appeal to the United States Court of Appeals for the Fourth Circuit, BMWE did not challenge the district court's factual determination that petitioners were neutral railroads unaligned with Guilford. Rather, BMWE contended that under Norris-LaGuardia, the district court lacked jurisdiction to enjoin BMWE from the secondary picketing of any neutral unaligned railroad in the country, including petitioners. (A. 3 - A. 4.)

On July 11, 1986, a panel of the Fourth Circuit in a two-to-one vote issued its opinion reversing the district court and quashing the preliminary injunction. The court rejected petitioners' argument that national labor policy as manifested in the RLA and Section 8(b)(4) of the NLRA barred secondary picketing of unaligned railroads. The panel held, in contrast, that Norris-LaGuardia forbids federal courts from enjoining peaceful secondary picketing of any rail carrier in the country by a rail union, even if the carrier has no relationship with the primary rail employer. (A. 2 - A. 4; A. 9 - A. 17.) The Fourth Circuit noted that the circuit courts of appeal were split on this question. (A. 15 - A. 16.) Judge Widener, dissenting, concluded that the law did not confer on BMWE the unlimited power to impose secondary strikes on neutral employers. In reaching this conclusion he determined that the substantial alignment test should be applied to the present dispute and that the purposes of Norris-LaGuardia must be accommodated with the RLA. (A. 4; A. 17 - A. 22.)

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S HOLDING THAT THE NORRIS-LaGUARDIA ACT PERMITS UNLIMITED SECONDARY PICKETING IN THE RAIL INDUSTRY DEPARTS DRASTICALLY FROM PRIOR FEDERAL CASE LAW, INCLUDING LEADING DECISIONS IN THE FIFTH AND EIGHTH CIRCUITS, AND REQUIRES SUPREME COURT REVIEW TO RESOLVE THE RESULTING CONFLICT IN THE CIRCUITS ON A RECURRING ISSUE OF NATIONAL IMPORTANCE.

A. The Fourth Circuit's Holding That Rail Unions May Initiate Unlimited Secondary Picketing Against Neutral Railroads Represents a Radical Departure From Prior Case Law and Creates a Split in the Circuits.

It is the legal position of BMWE, accepted by the Fourth Circuit below, that whenever a rail union has a labor dispute with any rail employer in the country, the union has the unfettered right under Norris-LaGuardia, 29 U.S.C. §§ 101 *et seq.*, to shut down the entire rail industry by means of secondary picketing for the purpose of coercing the struck railroad to capitulate to the union's demands.[2]

---

[2]The union bases this legal position in large measure on the language of § 13(a) of the Act, which provides in pertinent part that: "A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry . . . ." 29 U.S.C. § 113(a). The union reasons that while its actual labor dispute regarding terms and conditions of employment is with a small, geographically isolated railroad in New England, the language of Norris-LaGuardia permits it to treat the entire rail industry as a target for strike activity even though the other railroads are in no substantial way aligned with the struck railroad and have no ability to intervene in the primary labor dispute to force its resolution.

The Fourth Circuit's endorsement of unlimited secondary picketing in the rail industry represents a radical departure from the prior case law dealing with this issue.[3] In fact, in the 60 years since passage in 1926 of the RLA, 45 U.S.C. §§ 151 *et seq.*, and the more than 50 years since passage in 1932 of Norris-LaGuardia, no federal court until the recent controversy ever held that a rail union engaged in a primary labor dispute with a single rail carrier could stop, with impunity, all rail transportation in America. To the contrary, every federal case decided by the courts prior to 1986 had interpreted Norris-LaGuardia in light of its legislative history and the national labor policy contained in the RLA and Section 8(b)(4) of the NLRA, as amended, 29 U.S.C. § 158(b)(4), to permit secondary picketing of only those rail carriers who had substantially aligned themselves with the struck railroad.

The first case to apply a substantial alignment test to determine the proper application of Norris-LaGuardia

---

[3]In recent decisions involving the same legal issue as that presented in this case the Second, Seventh, and D.C. Circuits have accepted the position asserted by BMWE. *Burlington N. R.R. Co. v. BMWE*, No. 86-1666 (7th Cir. June 4, 1986); *Central Vermont Ry. v. BMWE*, No. 86-5245 (D.C. Cir. May 14, 1986; June 26, 1986); *Consolidated Rail Corp. v. BMWE*, No. 86-7289 (2d Cir. June 5, 1986). These decisions are in direct conflict with previous decisions of the Fifth and Eighth Circuits. *Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R.*, 362 F.2d 649 (5th Cir.), *aff'd by an equally divided court*, 385 U.S. 20 (1966); *Ashley, Drew & N. Ry. Co. v. United Transp. Union*, 625 F.2d 1357 (8th Cir. 1980). This Court was petitioned for a writ of certiorari by the Burlington Northern Railroad Company based on the Seventh Circuit's decision in *Burlington N. R.R. Co. v. BMWE*, No. 86-1666 (7th Cir. June 4, 1986), *petition for cert. filed*, — U.S.L.W. — (U.S. July 15, 1986) (No. 86-39).

in the secondary picketing context grew out of a strike against the Florida East Coast Railway in the early 1960's. In *Brotherhood of Railroad Trainmen v. Atlantic Coast Line Railroad,* 362 F.2d 649 (5th Cir.), *aff'd. by an equally divided court,* 385 U.S. 20 (1966), the Fifth Circuit refused to read Norris-LaGuardia literally to bar injunctions against secondary picketing activity by rail unions directed against rail employers. Rather, the Fifth Circuit held that Norris-LaGuardia prevented injunctions against secondary picketing only where the picketing union was legitimately pursuing its traditional economic self-interest. The court concluded that this self-interest legitimated secondary picketing only against a "secondary employer, who has aligned himself with the primary employer in some substantial manner." *Id.* at 655. In constructing this "substantial alignment test," the Fifth Circuit applied in the RLA context, a legal test akin to the "ally doctrine" that sets the limits of lawful secondary activity under Section 8 (b)(4) of the NLRA. *See* 362 F.2d at 654 n.8 and 655 n.9.[4] Applying this test to the facts in *Atlantic Coast Line,* the Fifth Circuit found the existence of sufficient alignment to permit secondary activity because a

---

[4]Although federal cases predating *Atlantic Coast Line* had not articulated as clearly the test applied by the Fifth Circuit in determining the legitimate secondary activity of a rail union, earlier cases had imposed similar restrictions in the secondary boycott context. *See Lakefront Dock & R.R. Terminal Co. v. I.L.A.,* 333 F.2d 549 (6th Cir. 1962); *Erie R.R. v. Local 1286, Internat'l Longshoremen's Ass'n,* 117 F. Supp. 157 (W.D.N.Y. 1953); *Illinois Central R.R. v. International Brotherhood of Teamsters, Local 568,* 90 F. Supp. 640 (W.D. La. 1950); *Pacific Gamble Robinson Co. v. Minneapolis & St. Louis Ry.,* 85 F. Supp. 65 (D. Minn. 1949).

secondary employer was providing essential services and facilities to the struck employer.[5]

Subsequent to *Atlantic Coast Line*, the federal courts consistently applied the substantial alignment test to determine whether secondary strike activity was enjoinable under Norris-LaGuardia. For example, a number of federal courts applied this test to secondary activity initiated by the Brotherhood of Railway, Airline and Steamship Clerks during its primary strike against Norfolk and Western Railway Company in 1978.[6]

In 1979, this issue arose again in the Eighth Circuit during a strike involving the Rock Island Railroad. Relying on prior case law, the Eighth Circuit in *Ashley, Drew & Northern Railway v. United Transportation Union*, 625 F.2d 1356 (8th Cir. 1980), adopted the "substantial alignment test" to determine when a union's secondary activity is sufficiently unrelated to its economic interest in a given

---

[5]The union has not appealed the district court's finding below that NS Railroads is a neutral employer which has not aligned itself with the primary employer in the present dispute. (A. 3 - A. 4.)

[6]In those cases where the courts found substantial alignment, they held that Norris-LaGuardia barred the aligned secondary railroad from obtaining injunctive relief. *See Southern Ry. v. Brotherhood of Ry. Clerks*, 458 F. Supp. 1189 (D. S.C. 1978); *Alton & S. Ry. v. Brotherhood of Ry. Clerks*, 99 L.R.R.M. 2323 (D. D.C.), *aff'd*, 99 L.R.R.M. 3326 (D.C. Cir.), *cert. denied*, 439 U.S. 996 (1978). Where the secondary railroad, however, was not found to be substantially aligned with the struck railroad, the courts held Norris-LaGuardia was not a bar to injunctive relief. *See Western Maryland R.R. v. System Board of Adjustment*, 465 F. Supp. 963, 973 (D. Md. 1979); *Terminal R.R. Ass'n v. Brotherhood of Ry. Clerks*, 458 F. Supp. 100 (E.D. Mo. 1978); *Consolidated Rail Corp. v. Brotherhood of Ry. Clerks*, 99 L.R.R.M. 2607 (W.D.N.Y. 1978).

labor dispute so as to be unprotected by Norris-LaGuardia. In *Ashley, Drew* the Eighth Circuit rejected the union's argument that Norris-LaGuardia must be read literally, finding that such a reading would engender absurd consequences and that a reasonable alternative consistent with Congressional intent—*i.e.*, the substantial alignment test—was available. 625 F.2d at 1365. The Eighth Circuit reasoned

> [The union] would have us . . . [reject] the economic self-interest test in favor of a literal application of § 13(a). [The union] argues the narrower scope circumscribed by the self-interest test is invalid in light of the express language and historical purpose of the Norris-LaGuardia Act. We disagree. Although the plain language of a statute is often controlling, it is impermissible to follow a literal reading that engenders absurd consequences where there is an alternative interpretation that reasonably effects the statute's purpose. Absurd consequences and a reasonable alternative are present here.

625 F.2d at 1365 (citations omitted).

The Eighth Circuit looked beyond the literal words of Section 13(a) of Norris-LaGuardia to the underlying legislative history and observed that "one cannot make sense of § 13(a) simply by focusing on the character of the parties; one must also consider the subject matter of the dispute." *Id.* The court found in the legislative history a Congressional recognition that Section 13(a) was "meant to preclude injunctive interference with bargaining or organizing on an industry-wide or craft-wide basis." *Id.* at 1366.[7] Where a rail union, therefore is not bar-

---

[7]As the Eighth Circuit noted, the economic self-interest test can be traced to Justice Brandeis' dissent in *Duplex Printing*

(Continued on following page)

gaining on an industry-wide basis, but rather negotiating with a single rail employer, the broad language of Section 13(a) does not apply. Under the latter circumstance, the union's right to engage in secondary picketing is permitted only to the extent that the secondary employer is substantially aligned with the struck employer.

The inherent fairness of the substantial alignment test is clear: secondary self-help may be permitted where it serves a purpose related to the primary dispute—discouraging alignment and assistance to the struck employer by other railroads. It is within the courts' power, however, to enjoin arbitrary strike activity imposed on neutral employers solely to inflict economic anarchy and to paralyze interstate commerce as a means of coercing the primary employer into accepting a labor settlement. By BMWE's own admission, this is precisely the nature of the strike at issue in the instant case. (A. 18.)

(Continued from previous page)

Press Co. v. Deering, 254 U.S. 443, 488 (1921). Law Professor, later Supreme Court Justice, Frankfurter when explaining the intent of § 13 of the Norris-LaGuardia Act similarly expressed the economic self-interest limitation when he stated:

> [Section 13 of the proposed Act] permits the collaboration of efforts between unions whom substantial interests make natural allies. It withholds immunity from the chancellor's decree at a point where combination aims to include unions that have no economic bond but only a sympathetic interest.

F. Frankfurter & N. Greene, *The Labor Injunction* 217 (1930). Elsewhere Frankfurter indicated that proposed § 13 of the Norris-LaGuardia Act grants immunity from injunction only to the limit of "substantial economic community of interest. There it terminates." *See* F. Frankfurter & N. Greene, *Congressional Power Over the Labor Injunction*, 31 Colum. L. Rev. 385, 407 (1931).

With the Fourth Circuit's decision in the instant case, and the similar decisions in the Second, Seventh and D.C. Circuits, rejecting the "substantial alignment test" in the rail labor secondary boycott context, a serious conflict in the circuits now exists. In these circuits, in contrast to the rule of the Fifth and Eighth Circuits, there is now no limit to a rail union's ability to engage in secondary picketing.[8]

B. The Split in the Circuits Involving Rail Unions' Right to Initiate Unlimited Secondary Activity Against Neutral Railroads Involves an Important and Recurring Issue Which Merits this Court's Review and Resolution.

The Fourth Circuit's decision below granting to rail labor the unlimited right to initiate secondary boycotts against railroads has far-reaching economic ramifications

---

[8]*Compare Burlington N. R.R. Co. v. BMWE,* No. 86-1666 (7th Cir. June 4, 1986); *Central Vermont Ry. v. BMWE,* No. 86-5245 (D.C. Cir. May 14, 1986; June 27, 1986); *Consolidated Rail Corp. v. BMWE,* No. 86-6289 (2d Cir. June 5, 1986); *Richmond, Fredericksburg & Potomac R.R. v. BMWE,* No. 86-3544 (4th Cir. July 11, 1986) (holding that rail unions may initiate unlimited secondary picketing of neutral employers) *with Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R.,* 362 F.2d 649 (5th Cir.), *aff'd by an equally divided court,* 385 U.S. 20 (1966); *Ashley, Drew & N. Ry. v. United Transp. Union,* 625 F.2d 1357 (8th Cir. 1980) (adopting substantial alignment test). Additionally, the Ninth Circuit's recent decision in *Smith's Management Corp. v. IBEW,* 737 F.2d 788 (9th Cir. 1984), although not a railroad case, reveals that the Ninth Circuit would probably adopt the Union's position if raised. The Sixth Circuit's earlier decision in *Lakefront Dock & R.R. Terminal Co. v. International Longshoremen's Ass'n,* 323 F.2d 549 (6th Cir. 1962), while not expressly adopting the substantial alignment test, imposed like restrictions on the scope of Norris-LaGuardia in the secondary boycott context.

which will have impact not only upon the nation's railroads and rail workers, but also upon all other industries and individuals across the country which depend on rail carriers for their livelihood or well-being.[9] Indeed, the broad scope of the controversy regarding the parameters of secondary self-help remedies available to rail unions is well-chronicled by the rash of suits which have been spawned across the country this year by BMWE's dispute with a small carrier (involving approximately one hundred workers) in the state of Maine. History teaches that the controversy surrounding the scope of secondary self-help remedies available to rail labor has presented a recurring source of litigation.

---

[9]One indication of the potential financial losses involved is what it will cost the petitioners if their operations cease as a result of secondary picketing. Testimony at the preliminary hearing before the district court below revealed that petitioners would lose in excess of $38,000,000 a day and over 31,000 of their employees would be without wages until resolution of any strike giving rise to secondary picketing. Undoubtedly, the nation's other railroads would suffer similar damages. The actual financial loss to the rail industry as a whole and the industries it serves defies practical calculation. Significantly, such losses would be incurred every time a rail union in the future exercises its newly found right to shut down the entire rail industry when it has a dispute with any single railroad in the country.

On July 15, 1986, President Reagan established a presidential emergency board to head off a national rail strike threatened by six rail unions including BMWE:

> In announcing establishment of the Board, the White House said that a nationwide railroad strike would have "an immediate effect on the public." The nation's railroads move more than one-third of all inter-city traffic, and a strike could result in layoff of 1.1 million employees in key rail-served industries after four weeks, in addition to the 300,000 railroad employees who would be idled.

BNA, Daily Labor Report No. 137 (July 17, 1986).

BMWE, itself, has acknowledged the recurring and important nature of the debate regarding the parameters of rail union secondary activity. The union recently petitioned this Court, prior to judgment, for review on this very question, noting:

> [T]hese issues have reoccurred with each (rail) strike for the past twenty years . . . . [I]t is crucial to [BMWE], to the rail industry and to this Country that these issues be resolved conclusively by this Court.

BMWE, Motion for Expedited Consideration and Argument, No. 85-1792 at p. 4, filed May 7, 1986.

In short, the controversy regarding the scope of permissible secondary picketing in the rail industry presents a recurring issue of critical, national importance which the circuits have been unable to resolve in uniform fashion. This question, which involves analysis of the fundamental purposes and operation of the RLA and national labor policy, merits this Court's review and resolution.

II. THE FOURTH CIRCUIT'S REFUSAL TO ACCOMMODATE NORRIS-LaGUARDIA TO THE RAILWAY LABOR ACT IGNORES SUPREME COURT PRECEDENT, IS ANTITHETICAL TO NATIONAL LABOR POLICY, AND YIELDS ABSURD RESULTS IN THE RAIL LABOR CONTEXT.

A. Supreme Court Precedent Mandates the Accommodation of Norris-LaGuardia to the Railway Labor Act in Furtherance of National Labor Policy.

In reading Norris-LaGuardia broadly and literally, the Fourth Circuit violated the principle of accommodation which this Court has repeatedly applied to restrict the literal meaning of the Act in the rail industry context. In

Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad, 353 U.S. 30 (1957), for example, this Court observed

> [T]he Norris-LaGuardia Act cannot be read alone in matters dealing with labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable.

353 U.S. at 40. *See also Virginian Railroad v. System Federation Number 40,* 300 U.S. 515, 563 (1937) (RLA cannot be rendered nugatory by the Norris-LaGuardia Act). Applying this principle in *Chicago & Northwestern Railway v. United Transportation Union,* 402 U.S. 570 (1971), this Court endorsed the enjoining of labor activity in violation of Section 2 First of the RLA, 45 U.S.C. § 152 First, the section which imposes a duty on railroads and their employees to exert reasonable efforts to settle disputes so as to avoid interruptions to interstate commerce. Similarly, this Court in *Chicago River, supra,* sanctioned use of an injunction to compel compliance with the arbitration process set forth in Section 3 of the RLA, 45 U.S.C. § 153.

The Fourth Circuit refused to apply the accommodation principle in this case on the ground that the RLA does not expressly impose limitations on a union's right to engage in secondary activity and the court would not find such limitations by implication. (A. 3 - A. 4; A. 8 - A. 17.)[10]

---

[10]Paradoxically, although the court is willing to infer rail labor's right to strike (which is nowhere stated in the RLA), it finds that it cannot infer any *limitations* to the right to initiate secondary activity.

The Fourth Circuit's decision on the accommodation issue requires review for several reasons. First, the decision fails to recognize that secondary picketing in the rail industry is inconsistent with the Congressional intent underlying the RLA. Congress expressly indicated in Section 2 of the RLA that its purpose was "to avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151a.[11] To effectuate this purpose, Congress established an elaborate mechanism for resolving all labor disputes that could disrupt rail transportation, including "minor disputes" resolved under Section 3 of the RLA, 45 U.S.C. § 153, "major disputes" resolved under Section 6 of the RLA, 45 U.S.C. § 156, and "miscellaneous disputes" resolved under Section 5, First of the RLA, 45 U.S.C. § 155, First. There was no need to provide machinery for dealing with disruptions caused by secondary picketing because at the time of passage of the RLA such activity was illegal. *E.g., Toledo, A.A. & N.M. Ry. v. Pennsylvania Co.*, 54 Fed. 730 (N.D. Ohio 1893) (Judge Taft).

---

[11]The goal of the Act as set forth by Congress was "to insure to the public continuity and efficiency of interstate transportation service, and to protect the public from the injuries and losses consequent upon any impairment or interruption of interstate commerce through failures of managers and employees to settle peaceably their controversies." H.R. Rep. No. 328, 69th Cong., 1st Sess. 1 (1926). Accordingly, this Court has recognized that Congress' primary purpose in enacting RLA was to avoid industrial strife leading to the interruption of commerce. *See, e.g., Texas v. N.O.R.R. v. Brotherhood of Ry. & Steamship Clerks*, 281 U.S. 548, 565 (1930) (primary purpose of RLA is "to provide a machinery to prevent strikes"); *Virginian Ry. v. System Fed'n No. 40*, 300 U.S. 515, 547 (1937) (major objective of RLA "is the avoidance of industrial strife"); *Detroit & Toledo S.L.R.R. v. United Transp. Union*, 396 U.S. 142, 148 (1969) (RLA passed "in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce").

Given the elaborate mechanism Congress established to protect rail transportation from disruption by labor disputes, and its understanding at the time that secondary picketing was illegal, it can only be concluded that implied in the Act was a Congressional prohibition against such activity. This conclusion is supported by the legislative history of the RLA, which demonstrates a strong Congressional intent that the Act protect the flow of interstate rail transportation from disruptive labor strikes. *See* Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 93d Cong., 2d Sess., *Legislative History of the Railway Labor Act, as Amended (1926 through 1966)* 172, 232 (1974).

An additional reason, erroneously rejected by the Fourth Circuit, exists for recognizing an implied prohibition against secondary activity in the RLA. When Congress initially drafted the RLA, it intentionally refrained from establishing with specificity all the rights and duties of rail carriers and employees under the Act. Rather, Congress established general obligations with the understanding that the courts would add specificity through evolving case law. As noted by a leading proponent of the Act during Congressional hearings:

> [T]his law has been written upon the theory, that in the development of the obligations in industrial relations and the law in regard thereto, there is more danger in attempting to write specific provisions and penalties into law than there is in writing the general duties and obligations into the law and letting the enforcement of those duties and obligations develop through the courts in the way in which the common law has developed in England and America.

Chicago & Northwestern Railway v. United Transportation Union, 402 U.S. 570, 576-77 (1971) (testimony of Donald R. Richberg).

Applying this principle in *Chicago & Northwestern*, this Court, as noted above, held that Section 2, First, 45 U.S.C. § 152, First, imposed mandatory duties on the parties that could be enforced by injunction despite Norris-LaGuardia. This Court has also found implied in the RLA a union right to engage in certain types of strike activity even though the Act nowhere mentions the right to strike or picket in any fashion. *See Brotherhood of Railroad Trainmen v. Jacksonville Terminal*, 394 U.S. 369, 378 (1969).[12]

These cases demonstrate that this Court has not hesitated in the past to identify implied rights or limitations in the RLA consistent with the underlying purpose of the Act—that is, to minimize disruptive effects of labor disputes on the free flow of interstate rail transportation. Moreover, this Court has looked in the past to the NLRA as a general Congressional statement of "national labor policy" to determine implied rights and limitations under the RLA:

> To the extent that there exists today any relevant corpus of "national labor policy," it is in the law developed during more than 30 years of administering our most comprehensive national labor scheme, the National Labor Relations Act. This Act represents the only existing Congressional expression as to the permissible bounds of economic combat . . . . The Court has in the past referred to the NLRA for assistance in construing the Railway Labor Act, . . . and we do so

[12]Significantly, the *Jacksonville Terminal* case left unresolved the very issue raised in this appeal—the limitations, if any, implied in the RLA on the extent of permissible secondary picketing. *See Ashley, Drew & N. Ry. v. United Transp. Union*, 625 F.2d 1356, 1370 n.25 (8th Cir. 1980).

> again here. [Holding that the issues involved must be resolved under federal, not state labor laws.]

394 U.S. at 383.

Similarly, this Court has not hesitated to look to "national labor policy" as expressed in the RLA to determine rights and limitations implied in the NLRA. In *Boys Markets, Inc. v. Retail Clerks Union, Local 770,* 398 U.S. 235 (1970), for example, this Court interpreted § 301 of the Labor Management Relations Act to permit enjoining a union strike that violated a labor contract with no-strike and arbitration provisions. Significantly, the Court looked to the RLA to find the controlling national labor policy in favor of resolving labor disputes by arbitration. 398 U.S. at 251.

The national labor policy as expressed in Section 8(b)(4) of the NLRA is clear—secondary picketing of neutral employers is illegal and against public policy. Any doubt as to that conclusion is quickly dispelled by reading the legislative history of the Taft-Hartley and Landrum-Griffin amendments to the NLRA, wherein the secondary boycott was characterized as "un-American" activity and "racketeering." *See, e.g.,* 93 Cong. Rec. 3954 (1947) (Senator Taft); 105 Cong. Rec. 14195 (1959) (Senator Griffin).[13]

---

[13]Senator Taft explained the absolute character of the proposed prohibition against secondary boycotts in Taft-Hartley as follows:

> It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing

(Continued on following page)

The Fourth Circuit's conclusion that the RLA by implication or omission permits such activity in the rail industry without limitation flies in the face of this unequivocal Congressional hostility to secondary picketing.[14] This conclusion is more troubling for the law it creates than for the law it ignores. The Fourth Circuit should have done as this Court has not hesitated to do in the past, and that is to look to national labor policy as expressed in parallel labor statutes to determine the implied rights and obligations under the RLA.

(Continued from previous page)

> with secondary boycotts as to make them an unfair labor practice.

93 Cong. Rec. 4323 (1947).

Senator Kennedy described the purpose of Landrum-Griffin to be:

> [T]o protect genuinely neutral employers and their employees, not themselves involved in a labor dispute, against economic coercion designed to give a labor union victory in a dispute with some other employer.

S. Rep. No. 187, 86th Cong., 1st Sess. at 78 (1959). In the same report, Senator Kennedy observed that secondary boycotts by rail employees "are just as much against the public interest as boycotts by anyone else." S. Rep. No. 187 at 80.

[14]Subsequent to Congress' expression of hostility toward secondary boycotts in Taft-Hartley and Landrum-Griffin, the courts have determined that rail unions are barred from secondary picketing of non-railroad employers. *Marriott In-Flite Services v. Local 504, Air Div. Transport,* 557 F.2d 295 (2d Cir. 1977). Similarly, it has been held that a rail union may not picket a secondary rail carrier if it is acting in concert with non-railroad unions. *International Bro. of Elec. Wkrs. v. N.L.R.B.,* 350 F.2d 791 (D.C. Cir. 1965). Thus, the decision below essentially embraces the position that despite Congress' antipathy toward secondary boycotts, Congress flatly intended to grant rail unions—and no other labor unions—the power to initiate unlimited secondary activity against the rail industry.

B. The Fourth Circuit's Failure to Accommodate Norris-LaGuardia to the Railway Labor Act Engenders Absurd Results in the Rail Labor Context.

The Fourth Circuit's decision below, as well as similar decisions by the Second, D.C. and Seventh Circuits, creates a loophole that emasculates the purposes and procedures of the RLA. Rather than encouraging a free flow of commerce, which is the central purpose of the RLA, the decision facilitates disruption of the rail industry on a national level.

The Fourth Circuit ignored the paradoxical consequences of adopting the BMWE's legal position. For example, if, as the Fourth Circuit held below, the federal courts have no power to enjoin secondary picketing activity under the RLA, then rail unions are free to initiate secondary picketing prior to the exhaustion of the dispute resolution procedures mandated in the RLA for resolution of primary disputes. Ironically, under the Fourth Circuit's holding, a rail union may be free to strike every rail employer in the country, except the primary employer responsible for the dispute, prior to the exhaustion of RLA dispute resolution mechanisms.

The Fourth Circuit's holding, in effect, eviscerates the elaborate status quo mechanisms provided in Sections 5, First, 6, and 10 of the Act, 45 U.S.C. §§ 155, First, 156, and 160. These provisions bar a union from engaging in self-help against the primary employer from the date of first notice of a major dispute until 30 days after all conflict mechanisms in the Act have been exhausted, including, if necessary, conclusion of mediation efforts by the National Mediation Board and, if a Presidential Emergency Board is subsequently created by the President, for

the two thirty-day status quo periods provided in Section 10 of the Act. *See Detroit & Toledo Shore Line Railroad v. United Transportation Union,* 396 U.S. 142, 150-53 (1969). For example, the ruling could permit a rail union to ignore the status quo requirement in Section 10 following the President's appointment of an Emergency Board as a last resort to resolve the labor dispute. By its terms, Section 10 applies only to a "dispute between a carrier and its employees." That being true, so long as a primary labor dispute exists between a rail union and a rail carrier, the status quo provisions of Section 10 may not preclude secondary picketing of other rail carriers across the country—even though the employees immediately involved continue to work for the primary employer pursuant to the Section 10 status quo requirements.[15]

Moreover, if BMWE's view of the law is sanctioned by the federal courts, an aggressive rail union can ensure that an isolated "labor dispute" is constantly maintained somewhere in this country. That union can then circumvent all of the RLA protections against disruptive strikes and picketing. For instance, in the presence of a dispute, which must be arbitrated under Section 3 of the RLA, the union could continue to work for the carrier directly involved but assert pressure on that carrier by secondarily picketing all other carriers. Rail unions would thereby have been given a self-help weapon that would vitiate the prime purpose of the RLA (*i.e.,* avoiding interruptions of interstate commerce).

In simple terms, the Fourth Circuit's refusal to accommodate Norris-LaGuardia to implied prohibitions in the

---

[15]The effect of the Emergency Board Order issued by the President expired as to Guilford and BMWE as of July 21, 1986.

RLA against unlimited secondary picketing, if not reversed by this Court, will render meaningless the RLA's protections against interruptions of interstate commerce. After sixty years of accommodation with other federal laws, those protections should not be so lightly cast aside.

III. THE FOURTH CIRCUIT'S DECISION MISCONSTRUED AND MISAPPLIED SUPREME COURT PRECEDENT INVOLVING THE APPLICABILITY OF THE NORRIS-LaGUARDIA ACT.

The Fourth Circuit principally relied on two decisions by this Court in concluding that BMWE may engage in unlimited secondary picketing against petitioners: *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969) ("*Jacksonville Terminal*"), and *Jacksonville Bulk Terminals v. International Longshoremen's Association*, 457 U.S. 702 (1982) ("*Jacksonville Bulk*"). (A. 6; A. 8 - A. 9.) These opinions, however, are inapposite to the facts in this case.

In *Jacksonville Terminal*, this Court only addressed the narrow question of whether state law could be invoked to enjoin picketing by a rail union of a facility that was providing essential services to a primary rail employer. That case involved both common situs picketing and substantial alignment. Common situs picketing constitutes a recognized exception to the general labor policy against secondary activity, and substantial alignment converts an otherwise secondary employer to the legal status of a primary employer. This Court determined, based on the doctrine of preemption, that federal law controlled the permissible scope of self-help remedies following exhaustion of the RLA's major dispute procedures and, therefore, the state court was without power to issue an

injunction against primary activity with certain "secondary implications." *Id.* at 384, 390.

The decision in *Jacksonville Terminal* does not support the Fourth Circuit's ruling that no secondary picketing against a railroad may be enjoined. The opinion's language suggests the opposite conclusion. The Court carefully limited the scope of its ruling in stating only:

> [T]hat the Railway Labor Act permits railway employees to engage in *some* forms of self-help free from state interference . . . ; and, drawing upon labor policies evinced by the National Labor Relations Act . . . that such protected activity includes peaceful "primary" strikes and non-violent picketing in support thereof . . . and that it cannot be categorically said that *all* picketing carrying "secondary" implications is prohibited . . . .

394 U.S. at 390 (emphasis original).

This language clearly indicates that *some* picketing carrying secondary implications may be prohibited,[16] and that the NLRA properly may be consulted as a beacon of federal labor policy in an effort to determine the scope of such prohibition.

Likewise, *Jacksonville Bulk,* upon which the Fourth Circuit heavily relied, involved nothing more than a primary strike by employees against their own employer over an issue more akin to politics than economics. The employer had argued that a labor dispute was not present due to the political motivation of the strike which did not seek to further the economic self-interest of the striking employees.

---

[16]This language is easily harmonized with the substantial alignment test which permits boycott activity with "secondary implications" against non-primary employers who provide support to the struck employer, but prohibits such activity aimed at purely neutral employers.

This Court refused to adopt the proferred economic self-interest test in the case of a primary dispute. As in *Jacksonville Terminal,* however, this Court in *Jacksonville Bulk* was not faced with secondary activity clearly precluded by Congress under the NLRA, and hostile to the underlying purposes of the RLA, and therefore was not compelled to consider the impact of Norris-LaGuardia upon the general labor policy against secondary picketing. Indeed, the Court specifically indicated that, in some circumstances, federal labor policy would bear directly on the application of Norris-LaGuardia, noting that:

> [W]e are not asked to accommodate the Norris-LaGuardia Act to a specific federal act or to the strong policy favoring arbitration.

457 U.S. at 717 n.17.

Nowhere in *Jacksonville Bulk* is there any language to suggest this Court intended to overrule several decades of judicial effort to harmonize Norris-LaGuardia with the general labor policy precluding secondary picketing of unaligned neutral railroads. In short, the Fourth Circuit misapplied the holdings in *Jacksonville Terminal* and *Jacksonville Bulk* in deciding that rail unions have an unlimited and absolute right to engage in secondary picketing against neutral railroads.

CONCLUSION

For the foregoing reasons, Norfolk and Western Railway Company, *et al.* respectfully petition this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

RICHARD A. KEENEY
General Counsel
Law Department
NORFOLK SOUTHERN
CORPORATION
8 North Jefferson Street
Roanoke, Virginia 24042-0041
(703) 981-5615

WILLIAM B. POFF*
W. FAIN RUTHERFORD
D. STAN BARNHILL
FRANK K. FRIEDMAN
WOODS, ROGERS &
HAZLEGROVE
105 Franklin Road, S.W.
Post Office Box 720
Roanoke, Virginia 24004-0720
(703) 982-4200

Counsel for Norfolk and Western Railway Company, et al.

* Counsel of Record

APPENDIX A

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 86-3555

Norfolk and Western Railway Company; Southern Railway Company; The Cincinnati, New Orleans and Texas Pacific Railway Company; The Alabama Great Southern Railroad Company; The New Orleans Terminal Company; Georgia Southern and Florida Railway Company; St. Johns River Terminal Company; Central of Georgia Railroad Company; Georgia Northern Railway Company; Live Oak, Perry and South Georgia Railway Company; Tennessee Railway Company; Tennessee, Alabama & Georgia Railway Company; Atlantic and East Carolina Railway Company; Carolina and Northwestern Railway Company; Interstate Railroad Company,

Appellees,

versus

Brotherhood of Maintenance of Way Employees, O. M. Berge, President; J. W. Pugh, General Chairman; T. R. McCoy, Vice General Chairman; G. L. Hockaday, General Chairman; William McWreath, General Chairman; J. L. D'Anniballe, General Chairman; Sol Hammons, General Chairman; D. E. Deloach, General Chairman; M. A. Christie, International Vice President; B. L. Hall, International Vice President; W. E. Larue, International Vice President.

Appellants.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, Chief District Judge. (C/A 86-191-R)

Argued: June 2, 1986 Decided: July 11, 1986

Before WIDENER, HALL, and PHILLIPS, Circuit Judges.

John O'Brien Clarke, Jr. (Thomas P. Murphy; Highsaw & Mahoney, P.C.; Gary E. Tegenkamp; Fox, Wooten & Hart; Louis P. Malone, III, General Counsel, Brotherhood of Maintenance of Way Employees on brief) for Appellants; William B. Poff (W. Fain Rutherford; D. Stan Barnhill; Frank K. Friedman; Woods, Rogers & Hazlegrove; Richard A. Keeney, General Counsel, Law Department, Norfolk Southern Corporation on brief) for Appellees.

HALL, Circuit Judge:

The Brotherhood of Maintenance of Way Employees, as well as certain of its officers and members (the "BMWE" or the "union"), appeal from an order of the district court preliminarily enjoining the union from picketing facilities of the Norfolk & Western Railway Company. We reverse.

In April, 1980, the Norfolk and Western Railway Company and other affiliated railroads ("N&W") filed suit against the BMWE under the Interstate Commerce Act and the Railway Labor Act, seeking to enjoin the union's picketing of the railroad's facilities near Bellevue,

Ohio.[1] The picketing occurred during the pendency of a labor dispute which the union had with the Maine Central Railroad Company ("MEC") and its subsidiary, the Portland Terminal Company ("PT"), as well as with other rail carriers in the Guilford Rail System.

The district court granted N&W's motion for a preliminary injunction, concluding that there was no substantial alignment between N&W and the MEC/PT or the Guilford Rail System and no labor dispute within the meaning of the Norris-LaGuardia Act, 29 U.S.C. §§ 104 and 113, which would justify the union's secondary picketing of N&W's facilities. This appeal followed.[2]

On appeal, the BMWE contends that the district court lacked jurisdiction to enjoin its picketing of N&W's facilities under the Norris-LaGuardia Act. In a related case decided today, *Richmond, Fredericksburg, and Potomac Railroad Co. v. Brotherhood of Maintenance of Way Employees*, — F.2d —, No. 86-3544 (4th Cir. ——————————, 1986),[3] we fully considered the questions presented in this appeal and resolved them in favor of the union. Accordingly, for the reasons stated in Parts

---

[1]This suit was brought in the Western District of Virginia, the judicial district in which N&W maintains its corporate headquarters.

[2]In conjunction with its appeal, the union moved this Court for summary reversal or, in the alternative, for a stay of the district court's order. Following briefing and oral argument, we granted the request for a stay pending full consideration of the appeal.

[3]The *Richmond, Fredericksburg* case involved the BMWE's secondary picketing of another railroad in the context of the union's same dispute with the MEC/PT.

II and III of that opinion, we reject the position advocated by N&W,[4] reverse the district court's order, and remand the case with instructions to dismiss the complaint for lack of jurisdiction.

REVERSED AND REMANDED
WITH INSTRUCTIONS

WIDENER, Circuit Judge, dissenting:

I respectfully dissent for the reasons stated in my dissent filed today in the related case, *Richmond, Fredericksburg, and Potomac Railroad Co. v. Brotherhood of Maintenance of Way Employees,* — F.2d —, No. 86-3544 (4th Cir. July 11, 1986).

I would affirm the district court's grant of a preliminary injunction following its conclusion that there was no substantial alignment between N&W and the Maine Central.

---

[4]N&W relies on the same arguments in the instant appeal as did the railroad in *Richmond, Fredericksburg.* In addition, N&W asserts that under the Railway Labor Act ("RLA") the BMWE has a duty to bargain with the railroad over whether the union may engage in secondary picketing. We reject that contention as meritless. The RLA does not ban the union's resort to peaceful secondary picketing and we are unwilling "to ignore the clear strictures of the Norris-LaGuardia Act in favor of a vague duty to negotiate not clearly expressed in the RLA." Consolidated Rail Corporation v. Brotherhood of Maintenance of Way Employees, No. 86-7289, slip op. at 6 (2d Cir. June 5, 1986). *Accord,* Central Vermont Railway, Inc. v. BMWE, No. 86-5245, slip op. at 7-11 (D.C. Cir. June 27, 1986).

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 86-3544

Richmond, Fredericksburg and
Potomac Railroad Company,

Appellant,

versus

Brotherhood of Maintenance of
Way Employees,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge. (C/A 86-352-A)

Argued: May 5, 1986 Decided: July 11, 1986

Before WIDENER, HALL and MURNAGHAN, Circuit Judges.

Fred Calvin Alexander (Thomas F. Farrell, II; Clifford R. Oviatt, Jr.; Boothe, Prichard & Dudley; Urchie B.

Ellis, Vice-President of Law, Richmond, Fredericksburg and Potomac Railroad Company on brief) for Appellant; John O'Brien Clarke, Jr. (Highsaw & Mahoney, P.C.; Louis P. Malone, III, General Counsel, Brotherhood of Maintenance of Way Employees on brief) for Appellee.

HALL. Circuit Judge:

Richmond, Fredericksburg and Potomac Railroad Company ("RF&P") appeals from orders of the district court denying its motions for preliminary injunctions in this action brought against the Brotherhood of Maintenance of Way Employees (the "BMWE"). In April, 1986, RF&P filed suit against the BMWE pursuant to the Railway Labor Act (the "RLA"), seeking to enjoin the union's picketing of its facilities at Alexandria and Richmond, Virginia. The picketing occurred during the pendency of a labor dispute between the BMWE and two New England railroads regarding pay and working conditions. Following RF&P's motions for preliminary injunctions to prohibit further picketing of its Alexandria and Richmond facilities, the district court concluded that it lacked jurisdiction to award the requested relief. We affirm.

I.

RF&P is a major railway carrier connecting the northeastern and southeastern parts of the United States. It operates two railroad yards, the Potomac Yard in Alexandria and the Acca Yard in Richmond, both of which have recently been picketed by the BMWE.

The BMWE has been involved in a labor dispute with the Maine Central Railroad Company ("MEC") and its

subsidiary, the Portland Terminal Company ("PT"). The MEC and PT, together with the Delaware & Hudson Railway ("D&H") and the Boston & Maine Corporation ("B&M"), are part of the Guilford Rail System, of which Guilford Transportation Industries, Inc., is the parent corporation. After exhausting the statutory procedures of the RLA without success in resolving the dispute, the union went on strike against MEC on March 3, 1986. Later that month the BMWE extended its picketing activities to the B&M and the D&H.

On April 2, 1986, MEC and PT broke off negotiations with the BMWE. The National Mediation Board, operating under the authority of the RLA, 45 U.S.C. § 151, then recessed its public interest mediation efforts without setting a future date for negotiations. The union asserts that it decided to extend its picketing further to include RF&P's Alexandria facilities in order to put economic pressure on the Guilford Rail System to bring MEC and PT back to the bargaining table.[1]

---

[1]According to the affidavit of William E. LaRue, international vice-president of the BMWE, filed with the district court:

> The D&H operates into plaintiff Richmond, Fredericksburg & Potomac Railroad's (RF&P) yard in Alexandria, Virginia (*i.e.*, the Potomac Yard), and obtains substantial traffic by interchange with other railroads in that yard. The BMWE has determined that it is important to the effectiveness of its strike against MEC/PT to ask D&H employees and other rail employees in the RF&P's Potomac Yard to withdraw their services from their employers in order to prevent the movement of rail cars to or from the Guilford Rail System. This action is necessary to place sufficient economic pressure upon the Guilford Rail System to convince them that it is in their economic interests to have the MEC/PT resume negotiations with the BMWE in order to resolve the disputes with this labor organization over rates of pay, rules and working conditions for employees which the BMWE represents on the MEC and PT.

On April 4, 1986, the BMWE posted pickets at Potomac Yard. Employees of RF&P and four tenant railroads refused to cross the union's picket lines. RF&P immediately sought to enjoin the picketing, alleging that such activity had a serious impact on its ability to perform services for the railroads, including those which were not involved in the MEC/PT dispute. On the same day that RF&P's action was filed, the district court denied appellant's request for a temporary restraining order ("TRO") and a preliminary injunction. The district court concluded that although RF&P appeared to be neutral, "it's not completely disinterested in the underlying labor dispute in that it has an association and does some business with the [MEC] and [PT], which do have the underlying labor dispute and which are of the same industry." Under these circumstances, the district court found that the Norris-LaGuardia Act, 29 U.S.C. § 104, deprived the court of jurisdiction to award injunctive relief.

On April 9, 1986, the union commenced picketing activity at RF&P's facilities in Richmond. The following day, RF&P returned to district court, seeking a TRO and preliminary injunction to enjoin the new picketing. Again, the district court denied relief on jurisdictional grounds.[2]

---

[2]In both instances the district court also denied injunctive relief pending appeal. RF&P then moved this Court for a stay of the district court's orders, pursuant to Fed. R. App. P. 8(a). On April 12, 1986, Judge Widener, as a single judge, granted an injunction in favor of RF&P pending appeal and expedited the appeal for consideration by this panel. Brotherhood of Maintenance of Way Employees v. Richmond, Fredericksburg and

(Continued on following page)

This appeal followed.[3]

II.

On appeal, RF&P contends that, contrary to the district court's conclusion, a federal court has jurisdiction to enjoin the picketing of a neutral railroad employer in order to accommodate the mandates of both the Railway Labor Act and the Interstate Commerce Act. Appellant further argues that injunctive relief is permissible where the neutral railroad is not substantially aligned with the railroad involved in the primary dispute with the union. We disagree with each of RF&P's contentions.

At the outset, we note that the union exhausted the procedures of the RLA and thereafter engaged in a law-

---

(Continued from previous page)

Potomac R.R. Co., No. 86-3544 (4th Cir. April 12, 1986), *cert. denied,* 54 U.S.L.W. 3838-39 (U.S. June 23, 1986) (No. 85-1792). After hearing argument, the panel on May 5, 1986, entered an order dissolving the injunction pending appeal (Judge Widener dissenting).

[3]After we heard argument in this case, President Reagan, acting pursuant to 45 U.S.C. § 160, issued an executive order on May 16, 1986, which convened an emergency board to investigate the dispute between the union and MEC/PT and issue a report within thirty days. 45 U.S.C. § 160 provides that in the meantime and "for thirty days after [the] board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."

We find that the executive order does not make this case moot in light of the fact that the substantive dispute between the union and MEC/PT continues, and unless settled by negotiations or resolved by legislation, will be reactivated thirty days following the report to the President. Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employees, No. 86-1666, slip op. at 4-5 (7th Cir. June 4, 1986).

ful strike against the MEC/PT. Moreover, the union's secondary picketing against the RF&P has been peaceful. Absent clear congressional intent to the contrary, peaceful boycotts and nonviolent picketing are a form of speech or conduct ordinarily entitled to protection under the first and fourteenth amendments to the Constitution. *See N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *American Federation of Labor v. Swing*, 312 U.S. 321 (1941); *Thornhill v. State of Alabama*, 310 U.S. 88 (1940). Significantly, the Supreme Court has held that in railroad disputes subject to the RLA until Congress acts, peaceful picketing in both primary and secondary situations is conduct which may not be proscribed by a state. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969). The question which we must resolve in this appeal is whether a federal court may enjoin such activity.

Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, provides in pertinent part that:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> > (a) Ceasing or refusing to perform any work or to remain in any relation of employment; . . .
> >
> > (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
>
> (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
>
> (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified.

The plain language of this statute severely limits the power of a federal court to enter the labor dispute area. A case is deemed to involve or grow out of a labor dispute:

> when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

29 U.S.C. § 113(a). The Act defines "labor dispute" broadly:

> The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of

> persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 113(c). And finally,

> A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

29 U.S.C. § 113(b).

Despite the sweeping language of the Norris-LaGuardia Act, RF&P maintains that the statute cannot be viewed in isolation. According to appellant, the district court had jurisdiction to issue an injunction prohibiting the picketing at issue here in order to accommodate the Railway Labor Act and the Interstate Commerce Act and to protect the public interest in avoiding interruption of commerce. The railroad's argument, however, would have us ignore the Supreme Court's decision in *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Assoc.*, 457 U.S. 702 (1982).

In *Jacksonville Bulk*, the longshoremen's union, reacting to the Soviet Union's intervention in Afghanistan, refused to load certain goods on ships bound for the Soviet Union. The employer then brought suit pursuant to the Labor Management Relations Act, 29 U.S.C. § 185(a), alleging that the union's work stoppage violated the terms of

the collective-bargaining agreement which contained a no-strike clause and a provision requiring arbitration of disputes. The Supreme Court held that (1) the broad anti-injunction provisions of the Norris-LaGuardia Act apply even to politically motivated work stoppages, and (2) the work stoppage in question was not an arbitrable dispute which could be enjoined under the collective bargaining agreement. Addressing the issue of what constitutes a labor dispute, the Supreme Court found that the Norris-LaGuardia Act does not require that "each" dispute relevant to the case be a labor dispute, but merely requires that the case involve "any" labor dispute. 457 U.S. at 711. Moreover, according to the Supreme Court, the plain terms of the Norris-LaGuardia Act deprived the federal courts of the power to enjoin the union's work stoppage, precipitated by the Soviet invasion of Afghanistan, without regard to whether the union also had a nonlabor dispute with another entity. *Id.* Finally, the Supreme Court reiterated the long-standing principle that the Norris-LaGuardia Act's broad prohibition against injunctions in any labor dispute will not be constricted "except in narrowly defined situations where necessary to accommodate the Act to specific federal legislation or paramount congressional policy." *Id.* at 708. *See also, id.* at 720.

We perceive no specific legislation or paramount congressional policy, either in the RLA or in the Interstate Commerce Act, which would support an "accommodation" exception to the anti-injunction mandate of Norris-LaGuardia, under the facts presented by this case. Appellant cannot simply rely on the general purposes of these statutes, i.e. to provide uninterrupted rail service and safe

and adequate transportation, in order to supply the specific congressional policy necessary to override Norris-LaGuardia's prohibition of injunctive relief.

In *Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employees,* No. 86-1666 (7th Cir. June 4, 1986), the Seventh Circuit addressed a similar claim by Burlington Northern which sought to challenge the BMWE's secondary picketing of the railroad's Chicago facilities in connection with the same dispute at issue here involving the Guilford System railways. In concluding that the Norris-LaGuardia Act prohibited the issuance of injunctive relief, the Seventh Circuit rejected the railroad's claim under the Interstate Commerce Act:

> The Supreme Court has held that the Norris-LaGuardia Act's ban on federal injunctions is not lifted because the conduct of the union is unlawful under some other, non-labor statute. *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330, 339 (1969); *Drivers' Union v. Lake Valley Co.*, 311 U.S. 91, 103 (1940).

Id. at 11-12. *Accord, Central Vermont Railway, Inc. v. BMWE,* No. 86-5245 (D.C. Cir. May 14, 1986; June 27, 1986).

Moreover, as the Seventh Circuit in *Burlington Northern* found, there is no basis for holding that the RLA of its own force authorizes injunctions against secondary picketing.[4] As long as the statutory procedures of the RLA

---

[4]There is nothing in the RLA comparable to Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), which prohibits certain forms of secondary picketing by non-rail labor. See Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 376 n.10 (1969).

have been exhausted and the primary strike is lawful, the Norris-LaGuardia Act applies to prevent a federal court from enjoining the union's resort to secondary picketing. *Burlington Northern, supra,* slip op. at 13-23.[5]

II.

RF&P next argues that injunctive relief is permissible under the Norris-LaGuardia Act where there is no showing that the picketed neutral railroad has aided, supported or aligned itself with the railroad involved in the primary dispute with the union. Both the Fifth and the Eighth Circuits have adopted a "substantial alignment" exception to Norris-LaGuardia. *Ashley, Drew and Northern Railways v. United Transportation Union,* 625 F.2d 1357 (8th Cir.

---

[5]We do not read Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Co., 353 U.S. 30 (1957), or Piedmont Aviation v. Airline Pilots Association, 416 F.2d 633 (4th Cir. 1969), *cert. denied,* 397 U.S. 926 (1970), relied upon by RF&P, to dictate a different conclusion. In *Chicago River,* the Supreme Court sanctioned an injunction against a strike over a minor dispute that was pending under the RLA before the National Railroad Adjustment Board. Similarly, in *Piedmont Aviation,* this Court found that the parties had an obligation to bargain under the provisions of the RLA before going on strike. *Cf.* Boys Markets, Inc. v. Retail Clerks' Union, Local 770, 398 U.S. 235 (1970) (Norris-LaGuardia Act did not prohibit injunction where it was undisputed that grievance in question was subject to adjustment and arbitration under collective-bargaining agreement and that employer was ready to proceed with arbitration at time injunction was sought and obtained).

In the instant case, however, RLA procedures have been exhausted and, in contrast to *Boys Market, Chicago River,* and *Piedmont Aviation,* there is no duty to arbitrate which could be the basis of a federal court injunction. *Cf.* Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO, 428 U.S. 397 (1976) (*Boys Markets* exception did not apply when only the question whether a sympathy strike violated the no-strike pledge, and not the dispute that precipitated the strike, was arbitrable under the parties' collective bargaining agreement).

1980); *Brotherhood of Railway Trainmen v. Atlantic Coastline Co.*, 362 F.2d 649 (5th Cir. 1966). *See also, Western Maryland R.R. Co. v. System Board,* 465 F.Supp. 963 (D. Md. 1979). Several other circuits, however, have rejected the exception, including some which have recently done so in the context of related secondary picketing activity by the BMWE against other railroads neutral in the dispute with the MEC/PT. *Burlington Northern Railroad Co. v. BMWE,* No. 86-1666 (7th Cir. June 4, 1986); *Central Vermont Railway, Inc. v. BMWE,* No. 86-5245 (D.C. Cir. May 14, 1986; June 27, 1986). *See also Smith's Management Corp. v. Electrical Workers,* 737 F.2d 788 (9th Cir. 1984). RF&P urges that this Circuit adopt a "substantial alignment" exception and apply it here to permit injunctive relief. Given the expansive definition of a "labor dispute" under the Norris-LaGuardia Act and the Supreme Court's admonition to construe this term broadly, see *infra,* Part II, we see no basis for such an exception and decline to adopt it for the reasons cogently stated by the Seventh Circuit:

> Under the "substantial alignment" test of *Ashley, Drew* the court must assess the wisdom of the union's call on the help of employees of the secondary employer . . . A court applying the "substantial alignment" test is weighing the economic gains to the union's members from secondary pressure against the losses the secondary conduct imposes on others in society. It is only a small exaggeration to say that this is exactly what courts were doing before 1932, exactly why Congress passed the Norris-LaGuardia Act. The union, its members, and the workers on whom the union calls for help—not the court—must decide how "substantial" an "alignment" ought to be to make secondary pressure appropriate.

Burlington Northern Railroad Co. v. BMWE, supra at 27-28.

IV.

For the foregoing reasons, the orders of the district court denying preliminary injunctive relief are affirmed.

AFFIRMED

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

At the outset, I should call attention to the fact that the setting in which the majority places this case is copied from the remarks of the district judge during argument and an affidavit filed in the district court, both of which are to the effect that although RF&P appeared to be a neutral it was not completely disinterested in the underlying labor dispute in that it has an association and does some business with Maine Central and Portland Terminal, which of course are in the same industry.

The problem with this fact finding on which the majority bases its opinion is that it leaves the impression that this case is a sort of substantial alignment case, though not expressed in words.

The majority does not take into account, however, and ignores two separate fact findings of the district court made in its orders of April 4, 1986 (concerning the Potomac yard) and April 10, 1986 (concerning RF&P's Richmond facility). The April 4th order finds that RF&P is "a neutral," and the April 10th order also finds that RF&P is "a neutral," and "there is no showing that any such picketing will result in any economic impact on the . . . [union]." This fact finding in an order of the court must be accepted rather than the remarks of the judge and the affidavit filed in the district court. We have addressed this subject on two occas-

ions and held in each that a court speaks through its judgments and orders. If the order of the court is contrary to an observation made by the judge in the transcript, and of course that would apply to the affidavit in this case also, it is the order which controls. *Murdaugh Volkswagen v. First Nat. Bank of S.C.*, 741 F.2d 41 (4th Cir. 1984); *Segars v. Atlantic Coastline RR Co.*, 286 F.2d 767 (4th Cir. 1961).

Far from arguing, as does the majority, that there may be some kind of tangential substantial alignment, the union embraces the district court's fact finding and takes the position that it may picket any railroad in the United States whether or not the picketed railway has any connection with the union or with the strike in Maine or with the parties to the strike in Maine. In other words, the union insists on its right to picket a neutral, as RF&P has been found to be.

I believe that the substantial alignment test of *Ashley, Drew*[1] should be applied in this case to give a federal court jurisdiction to enjoin BMWE's picketing of the RF&P's railroad yards. I also disagree with the majority's conclusion that *Jacksonville Bulk Terminals* requires that we ignore the public interest of avoiding interruption of commerce. Under the majority's interpretation of the Norris-LaGuardia Act, 29 U.S.C. § 104, et seq., BMWE can engage in picketing of any railroad facility in the country regardless of its complete disassociation from the underlying strike in Maine. I believe that such an overly broad construction of the Norris-LaGuardia Act fails to properly accommodate with the Norris-LaGuardia Act the purposes of the Railway Labor Act, 45 U.S.C. 151, et seq., and the Interstate Commerce Act, Title 49 U.S.C., esp. Ch. 111.

---

[1]*Ashley, Drew & Northern Ry. v. United Transportation Union*, 625 F.2d 1357 (8th Cir. 1980).

I disagree with the majority's broad reading of *Jacksonville Bulk Terminals.*[2] In that case, the Supreme Court was asked to decide the power of a federal court to enjoin a labor dispute based upon a politically motivated work stoppage. The fact there was that the union refused to provide labor to the employer to handle cargo bound to, or coming from, the Soviet Union, or carried on Russian ships. The cause of the union's action was the Soviet intervention in Afghanistan. The Court held that a federal court did not have jurisdiction under the Norris-LaGuardia Act to enjoin the work stoppage because the underlying dispute was not arbitrable under the terms of the collective bargaining agreement. The Court was concerned only with the reach of those anti-injunction provisions as they related to what was obviously and in fact a labor dispute but which was based on political motives. The Court was not called upon to rule on Norris-LaGuardia's applicability absent a labor dispute. Nor was it called upon to consider any accommodation between Norris-LaGuardia and the Railway Labor Act. See *Trainmen v. Chicago R & I R Co.*, 353 U.S. 30, 40 (1957). *Jacksonville Bulk Terminal* did, however, recognize that exceptions to Norris-LaGuardia can exist "where necessary to accommodate [that] Act to specific federal legislation or paramount congressional policy." Id. at 708. "There must be an accommodation of . . . [the Norris-LaGuardia Act] and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved." *Trainmen* at 40.

---

[2]*Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Assoc.*, 457 U.S. 702 (1982).

Such congressional policy is found in the Interstate Commerce Act and the Railway Labor Act itself as expressed policy against interference with the flow of interstate commerce.

I believe that *Railroad Trainmen v. Terminal Co.*, 394 U.S. 69 (1969), is more nearly on point to the issues at hand than is *Jacksonville Bulk Terminals* because *Railroad Trainmen* dealt directly with the Railway Labor Act and its relation to the Norris-LaGuardia Act which, as I have noted, *Jacksonville Bulk Terminals* did not. In *Railroad Trainmen,* the Court concluded that state law was preempted and that the Railway Labor Act permitted unions to employ a range of peacefully economic power, "so long as its use conflicts with no other obligation imposed by federal law." Id. at 392. That federal law is the prohibition against interference with interstate commerce. I disagree with the majority's conclusion that such a broad congressional policy is not enough to support accommodation between the Railway Labor Act, the Interstate Commerce Act and the Norris-LaGuardia Act. Slip op. at 10. By rejecting the basic principles governing the free flow of commerce, the majority allows the BMWE to bring the nation's entire rail system to a halt because of a labor dispute it has with a small railroad in New England.

I believe that the Eighth Circuit's approach in *Ashley, Drew* is a far more reasonable method in striking harmony in this area of the law. Also in accord is *Brotherhood of Railroad Trainmen v. Atlantic Coastline Co.*, 362 F.2d 649 (5th Cir.), affirmed by an equally divided court, 385 U.S. 20 (1966). *Ashley, Drew* teaches that Norris-LaGuardia's anti-injunction provisions cannot be reasonably applied

without looking at both the character of the parties and the subject matter of the dispute. Id. at 1365. After reviewing a long line of precedents, the Eighth Circuit concluded that

> it is reasonable to conclude that Section 13(a) [of Norris-LaGuardia, 29 U.S.C. 113(a)] was meant to preclude injunctive interference with bargaining or organizing on an industry-wide or craft-wide basis. It was not meant to extend an anti-injunctive shield to union activities beyond the place where the union's interest in a labor dispute ceases."

Ashley, Drew at 1366.

In order to fall within theh scope of Norris-LaGuardia's anti-injunction provisions, the union must show that the picketed company is substantially aligned with the company involved in the underlying labor dispute. In the case before us, BMWE has shown no substantial alignment between RF&P and the Maine Central. The district court twice found that the RF&P is "a neutral." I would adopt the reasoning of *Ashley, Drew* and would allow federal court intervention under the facts of this case. I think application of the Norris-LaGuardia Act is inappropriate here because the picketing of RF&P's yards does not involve or arise out of the only possible labor dispute in this record: the dispute between the BMWE and the Maine Central in Maine.

Because the RF&P is not substantially aligned with the Maine Central and has no dispute with Maine Central, labor or otherwise, I would reverse the order of the district court declining to enjoin picketing at railway facilities having no connection wha soever with the labor dispute in Maine.

The requirements of time (this dissent is transmitted by facsimile to our clerk's office for filing) prevent a more extended discussion of this most interesting and close question. In this respect, I should add that I especially rely upon the reasoning, as did *Ashley, Drew* to some extent, in the treatise *Labor and the Law,* Gregory & Katz (3d ed.) Ch. VII, especially p. 184, et seq.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civil Action No. 86-0191-R

NORFOLK AND WESTERN RAILWAY COMPANY, et al.,

Plaintiffs,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, et al.,

Defendants.

ORDER FOR PRELIMINARY INJUNCTION

(Filed April 22, 1986)

This matter came on to be heard on plaintiffs' motion for preliminary injunction, notice having been given to all concerned parties pursuant to Rule 65 of the Federal Rules of Civil Procedure. The court having heard testimony and evidence produced by all parties hereto, hereby finds that:

1. Defendants are threatening to engage in a strike and secondary picketing at plaintiffs' premises and facilities.

2. Such a strike is unlawful as it is intended to cause, and would in fact cause, plaintiffs to breach those duties imposed upon them by the Railway Labor Act, 45

U.S.C. § 151 *et. seq.* and the Interstate Commerce Act, 49 U.S.C. § 11101 *et. seq.* which requires plaintiffs to provide freight transportation upon reasonable request.

3. Such a strike, if permitted, would cause immediate, severe and irreparable harm, injury, loss and damage to plaintiffs in that their rail operations would be effectively halted, thereby precluding them from performing the obligations to transport freight as imposed by the Interstate Commerce Act 49 U.S.C. § 11101 *et. seq.* Further, such a strike, if not enjoined, would deprive the plaintiffs of substantial revenues for each day that picketing continues, employees of plaintiffs will be deprived of their employment and wages, and numerous industries in a significant portion of the United States will be deprived of the railroad transportation of raw materials and finished goods essential for their continued operation, thereby impairing the health, welfare and safety of the general public.

IT IS THEREFORE ORDERED that the defendant Union, its officers, agents, employees and members, and each of the individual defendants and all persons acting in concert with them be and they are hereby preliminarily enjoined from:

(a) encouraging, inducing, approving, continuing, starting or carrying out any picketing on any of the plaintiffs' railroad facilities;

(b) picketing any of the premises on which any of the plaintiffs conducts its railroad operations, including any entrance thereto, and all other placed where any of the plaintiffs' railroad business and operations are carried on;

(c) interfering with ingress to egress from said premises;

(d) interfering in any manner with the delivery, loading, unloading, dispatch or movement or any of plaintiffs' equipment or any of the contents thereof, and from loitering or congregating on premises of any of the plaintiffs, or at or near any approaches to such premises, or upon any public street or highway leading to or from any places where employees of any of plaintiffs, or those having business with any of the plaintiffs, desire to enter or leave en route to or from such premises; and

(e) in any manner interfering with or inducing or endeavoring to induce any person employed by any of the plaintiffs from performing his work and duties and from in any manner endeavoring to induce such employee to desist therefrom.

and it is further

ORDERED that this preliminary injunction is granted and the bond previously filed by plaintiffs in the sum of $10,000.00 shall be increased to $300,000.00 without surety.

The Clerk shall forthwith mail certified copies of this order to all counsel of record.

Dated: 5:15 o'clock p.m.
22 April, 1986, 1986

/s/ JAMES C. TURK
United States District Judge

A TRUE COPY, TESTE:
Joyce F. Witt, Clerk
/s/ By: R. Collins
Deputy Clerk

APPENDIX D

RAILWAY LABOR ACT, 45 U.S.C. § 151 ET SEQ.

§ 151a. *General purposes*

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

§ 152. *General duties—Duty of carriers and employees to settle disputes*

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions. and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * * *

Conference of representatives; time; place; private agreements

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice; *And provided further,* That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

* * * *

§ 153. *National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards; judicial review*

First.

* * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * *

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy

of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

§ 155. *Functions of Mediation Board—Disputes within jurisdiction of Mediation Board*

First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communications with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor

as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

* * * *

§ 156. *Procedure in changing rates of pay, rules, and working conditions*

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have

been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

§ 157. *Arbitration—Submission of controversy to arbitration*

First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 151-156 of this title, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such a party by the terms of this chapter or otherwise.

* * * *

§ 160. *Emergency Board*

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt inter-

state commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall inevestigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

NORRIS-LAGUARDIA ACT, 29 U.S.C. § 101 ET SEQ.

§ 101. *Issuance of restraining orders and injunctions; limitation; public policy*

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

§ 104. *Enumeration of specific acts not subject to restraining orders or injunctions.*

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dis-

pute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

§ 113. *Definitions of terms and words used in chapter*

When used in this chapter, and for the purposes of this chapter—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests

therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

NATIONAL LABOR RELATIONS ACT, 45 U.S.C. § 151 ET SEQ.

§ 158. *Unfair Labor Practices*

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8 (e) [subsec. (e) of this section];

(B) forcing or requiring any person to cease using, selling, handling, transporting, or other-

wise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the em-

ployees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: Provided, further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

INTERSTATE COMMERCE ACT,
49 U.S.C. § 10101 ET SEQ.

§ 11101. *Providing Transportation and Service*

(a) A common carrier providing tranportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide the transportation or service on reasonable request. In addition, a motor common carrier shall provide safe and adequate service, equipment and facilities. A rail carrier shall not be found to have violated this section because it fulfills its commitments under contracts approved under Section 10713 of this title before responding to reasonable requests for service.